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Washington Focus: Steve Aftergood of Secrecy News has highlighted agency complaints in the 2016 Defense Department Chief FOIA Officer report that its FOIA offices have been "overwhelmed by one or two requesters who try to monopolize the system by filing a large number of requests or submitting disparate requests in groups which require a great deal of administrative time to adjudicate." One requester had filed at least 308 requests in the current fiscal year and had 415 requests and 54 appeals with the Main DOD FOIA office in the past two years. The report also noted that because of litigation involving former Secretary of State Hillary Clinton's emails, DOD had been forced to provide more resources to its litigation team since its records are frequently implicated as well. Reflecting on this problem, Aftergood observed that "it is entirely permissible for a person to file dozens or hundreds of requests in a matter of days, at little or no cost to himself, and to obligate the government to respond to each one. So while the 'supply' of government resources to respond to FOIA requests is constrained by agency budgets, the 'demand' from requesters is effectively unchecked. The growth of backlogged requests is a predictable consequence."

OGIS Finds Little Data to Assess Effects of Still Interested Letters

The Office of Government Information Services has issued a compliance review of the use of still interested letters by agencies. While the use of still interested letters has been frequently criticized by open government groups, OGIS's report, while admittedly based on sparse data, found little statistical evidence that the still interested letter practice has much effect on the fate of requests. OGIS found that agencies whose annual reports indicated that they used still interested letters showed that the practice affected no more than one percent of their requests. But OGIS noted that "through our mediation and compliance work we are aware of several agencies that regularly use still interested letters, but have not reported closing any requests using these letters.

The OGIS review of still interested letters resulted from an October 2014 letter from EPIC and other open government groups asking OGIS to assess the impact and legitimacy of such letters. OGIS began its review in August 2015 and issued its finding this week. OGIS admitted it was difficult to find much data concerning the practice, although it noted that the Office of Information Policy at the Justice Department issued guidance on using still interested letters in July 2015. That guidance itself was a response to the concerns of the open government community about the practice, but beyond OIP's guidance, OGIS found little solid evidence to assess agency use of the still interested letters except by a variety of inferences that appeared in agency annual reports.

OGIS found two distinct types of still interested letters. The report explained that "generally, agencies inform a requester that the request will be closed unless the requester responds by a certain deadline. The other type of still interested letter we observed is correspondence informing requesters that their request is closed and stating that they should contact the agency if they are still interested in the agency processing their requests. For example, in 2012 Customs and Board Protection, a component of DHS, used the second type of still interested letter to administratively close to 11,000 FOIA requests; the agency had to re-open the requests and process them." While the first type of still interested letter is the kind most commonly debated, agencies actually close many requests administratively after deciding the request is insufficient because it lacks a personal certification or fails to agree to pay fees. This is routinely used at agencies like the State Department and U.S. Citizenship and Immigration Services, which deal with large numbers of requests for visa applications or immigrant status. Although requesters are notified that their requests are insufficient, it is incumbent on the requester to submit a second request that satisfies those matters the agency identified as insufficient.

OGIS was at a distinct disadvantage in having to rely on data culled from agency annual reports since the reports allow agencies to provide various reasons for denying a request for reasons unrelated to exemption claims. The compliance report indicated that "in describing 'other' reasons, some agencies note a lack of a response to a still interested letter, while other agencies reported reasons that *might* be attributed to a lack of a response to a still interested letter, such as 'no response from requester' or 'unable to contact requester.' We also note that it is possible that agencies reported requests closed using a still interested letter to the 'request withdrawn' subcategory."

Based on its review of the annual reports, OGIS calculated that "cabinet-level agencies as a whole reported closing an average of about 2,455 requests per year using still interested letters. The number of requests that agencies reported closing by using still interested letters is small compared to the number of requests the agencies processed; in all but one of the 17 reporting periods, the number of requests closed using still interested letters accounted for less than 1 percent of all FOIA requests processed." The report found that the Department of Justice closed no more than ten requests a year between FY 1998 and FY 2006. But the Department of Health and Human Services reported closing 20,211 requests between FY 2005 and FY 2014 using still interested letters. The report added that "the number of requests that agencies reported closing using still interested letters was relatively small—there are only 11 instances when Cabinet-level agencies reported closing more than 100 requests using still interested letters between FY 1998 and FY 2014. Only two agencies—HHS and DHS—reported closing more than 500 requests using still interested letters during any of the reporting periods. HHS accounted for seven of the eight instances in which an agency reported closing more than 500 requesting using still interested letters."

The report concluded by observing that "available data regarding agency use of still interested letters is limited. In particular, the data does not allow us to account for how many still interested letters an agency sends out during a reporting period, how much time has passed between the agency's last correspondence with the requester and when the still interested letter is sent, or how many times a particular requester is sent a still

interested letter before an agency completes his or her request." It noted further that "we found no guidance or standards related to how agencies should report requests closed using still interested letters. We note that agencies reported closing requests administratively using an 'other' method that might be used to describe a still interested letter. The particular categories we noted that might be used to describe a still interested letter were 'no response from requester' and 'unable to contact requester.' We also noted that agencies could reasonably report requests closed using a still interested letter as 'withdrawn.'" The report observed that "further study, including a review of agency policies and practices, is necessary to better understand the issues surrounding the use of still interested letters and to make recommendations regarding their use. We assess agency use of still interested letters as part of our agency compliance program, but we do not yet have enough information about agency practices to draw conclusions."

Views from the States…

The following is a summary of recent developments in state open government litigation and information policy.

Connecticut

A trial court has ruled that records seized by the police from the home of the Sandy Hook elementary school shooter are not public records and that the state is obligated under the seized properties statutes to return such property to its owner once it is no longer needed by the state for law enforcement purposes. None of the property seized from the home of the Sandy Hook shooter was reclaimed and David Altimari, a reporter for the Hartford *Courant*, requested copies of several items. The Department of Emergency Services and Public Protection refused to disclose the records and Altimari filed a complaint with the FOI Commission. The Commission concluded that the items were public records subject to disclosure now that the case was closed. The Department filed suit. Ruling in favor of the department, the court noted that "the [FOIA] conflicts with those provisions [requiring the return of seized property] by providing public disclosure of documents that were private property before seizure by the police and that a court would ordinarily order returned to the rightful owner by the end of a criminal case." The court pointed out that "there are a myriad of [ ] circumstances in which the state will not disclose any particular item of seized evidence. . .In this context, the court, despite the commission's interpretation, ultimately has a mandatory, statutory duty to return the seized property, unless it is contraband or otherwise unlawful to possess, to the owner before anyone from the public will have an opportunity to see it. In these situations, the seizure statutes act as a shield from public disclosure." The court indicated that "the commission ultimately proposes a statutory scheme that seems too illogical for the legislature to have contemplated." The court noted that "the better view is that the seizure statutes act as a shield from public disclosure of all seized property not used in a criminal prosecution. . .In that way, there will be a consistent statutory scheme that does not render the state seizure statutes ineffective or meaningless." (*Commissioner, Department of Emergency Services and Public Protection v. Freedom of Information Commission*, No. CV15-6029797S, Connecticut Superior Court, Judicial District of New Britain, April 8)

Florida

The supreme court has ruled that a public agency is required to pay attorney's fees if the court finds the agency unlawfully refused to disclose the requested records. In so doing, the supreme court settled a conflict within the state appellate courts, rejecting rulings from several appellate courts that had found that an agency was not liable for attorney's fees if it had acted in good faith. The supreme court explained that the

ACCESS REPORTS

original standard in the attorney's fees provision of the Public Records Act was whether an agency had "unreasonably refused" to disclose records. That provision was amended in 1984 to change the standard to "unlawfully refused." The supreme court interpreted this change to mean that the legislature "eliminated the potential that an award of attorney's fees would be denied just because the public agency acted reasonably in violating the Public Records Act." The supreme court noted that "the public agency's failure to comply, rather than its good or bad faith in doing so, became the relevant inquiry." The supreme court pointed out that "if an individual is required to enforce his or her entitlement to public records through the filing of a civil action and prevails, the purpose of the statute is frustrated if the prevailing individual must incur the attorney's fees—rather than the public agency that violated the Public Records Act—merely because the individual is unable to establish that the public agency acted unreasonably or in bad faith. Accordingly, we conclude that a prevailing party is entitled to statutory attorney's fees under the Public Records Act when the trial court finds that the public agency violated a provision of the Public Records Act in failing to permit a public record to be inspected or copied." (*Board of Trustees of Jacksonville Police & Fire Pension Fund v. Curtis W. Lee*, No. SC13-1315, Florida Supreme Court, April 14)

Illinois

A court of appeals has upheld the trial court's ruling that a report submitted by a named officer of the Peoria Police Department that resulted later in disciplinary proceedings against two officers does not qualify for the exception for adjudication of an employee grievance or disciplinary proceedings. The *Peoria Journal Star* requested reports filed by Sgt. Kerrie Davis. The police department found two reports, but refused to disclose one report because it was later used as the basis for a disciplinary proceeding. The newspaper complained to the Public Access Bureau at the Attorney General's Office, which found the report did not qualify for the exception for adjudication of disciplinary proceedings. The police continued to withhold the report and the *Journal Star* filed suit. The trial court also ruled in its favor. When the police appealed, the appeals court sided with the newspaper as well. The appellate court noted that "the report constituted a grievance that was investigated, substantiated, and ultimately resulted in disciplinary proceedings. However, the report was created well before any adjudication took place and existed independently of any adjudication. That the report later led to disciplinary action against two officers is insufficient to make it exempt under FOIA." (*Peoria Journal Star v. City of Peoria*, No. 3-14-0838, Illinois Appellate Court, Third District, April 18)

Indiana

The supreme court has ruled that the state legislature is subject to the Access to Public Records Act, but that whether or not the state legislature may withhold records under the work product exemption is not justicable, and thus is not properly before the court. In a case involving several requests to Indiana House Representative Eric Koch for correspondence with various businesses pertaining to specific legislation, Koch contended he was not subject to the APRA. The requester complained to the Public Access Counselor, who found the legislature was not subject to APRA and that the records requested fell within the work product exemption. The requesters then filed suit. The trial court dismissed the case as being non-justicable and the supreme court then agreed to review the case. The supreme court initially noted that it had subject matter jurisdiction, explaining that "dismissal for lack of justiciability is separate and distinct from having subject matter jurisdiction. Declining to hear a case on grounds of non-justiciability arises due to 'prudential concerns over the appropriateness of a case for adjudication.'" The supreme court pointed out that "the General Assembly did not exercise [its] authority by excluding itself from the reach of APRA by either statute or rule. In fact, the explicit exception within APRA for the 'work product of individual members, and the partisan staffs of the general assembly' clearly contemplates APRA's application to the General Assembly and its members. Because the General Assembly contemplated APRA's application to itself and its members, we see

no prudential reason why this question should be avoided on grounds of justiciability. We hold that APRA does apply to the General Assembly and its members." But the court indicated that "the determinative issue in relation to justiciability arises instead under Defendants' assertion that even if APRA is applicable, the requested documents are exempt from disclosure under APRA." The court added that "the term 'work product' is not defined within APRA nor by rule. Thus, the question becomes whether, under the principles of justiciability, this Court should define legislative 'work product' and order the legislature to disclose records in accordance with this court-created definition. This we will not do." (*Citizens Action Coalition of Indiana v. Eric Koch and Indiana House Republican Caucus*, No. 49S00-150-PL-00607, Indiana Supreme Court, April 19)

Michigan

A court of appeals has ruled that the Michigan Constitution insulates the University of Michigan Board of Regents from having to hold informal meetings in public. Based on the Michigan Supreme Court's decision in *Federated Publications v. Board of Trustees of Michigan State University*, 594 NW 2d 491 (1999), the appeals court agreed with the trial court that state university boards were only required to hold formal meetings in public. Upholding the trial court's ruling, the court of appeals noted that "it is clear and unambiguous that our Supreme Court has already determined the outcome of this matter, and the [trial court] has already applied it. The Constitution permits defendant to hold informal meetings in private; defendant is only required to hold formal meetings in public. We are simply not empowered to evaluate whether that is good policy or, for that matter, take any action on the basis of whether we might believe it to be." (*Detroit Free Press, Inc. v. University of Michigan Regents*, No. 328182, Michigan Court of Appeals, April 26)

New Hampshire

The supreme court has ruled that the choice of format provision in the Right to Know Law is ambiguous, but because the statute is designed to promote access to government records the Timberlane Regional School District must provide Donna Green with a copy of its budget in electronic format. The school district was willing to make a copy available to Green for inspection. She requested an electronic copy instead and the school district refused. The trial court ruled in favor of the school district, finding that the choice of format provision in the Right to Know Law allowed the agency to choose the most convenient format. Green appealed. The supreme court found that both Green and the school board had reasonable interpretations of the statutory language. But the court indicated that "in light of the purpose of the Right to Know Law, and our broad construction of it, we conclude that the trial court erred when it determined that the plaintiff was not entitled to the requested documents in electronic format." The court explained that "there is no evidence that it was 'not reasonably practicable' to copy the requested document 'to electronic media using standard or common file formats.'" (*Donna M. Green v. School Administrative Unite #55*, No. 2015-0274, New Hampshire Supreme Court, April 19)

New Jersey

A court of appeals has ruled that Galloway Township is not required to create a list of emails sent by the town clerk and the chief of police during a week in June 2013. The trial court had found that information about who sent and received emails constituted metadata and was subject to disclosure under the Open Public Records Act. The township had previously created logs of emails in the past but discontinued them when it became too burdensome. The appeals court noted, however, that "we hold that OPRA does not require the creation of a new government record that does not exist at the time of a request, even if the information sought to be included in the new government record is stored or maintained electronically in other government records." The court pointed out that "while the OPRA request under review might not present a burdensome

ACCESS REPORTS

task, we can easily envision requests of a similar nature that would present such a burden. In light of our interpretation of the clearly-worded statute, and the far-reaching implications of requiring governmental entities to produce lists and compilations that do not otherwise exist, we conclude that any extension of OPRA should properly come from the Legislature." (*John Paff v. Galloway Township*, No. A0125-14, New Jersey Superior Court, Appellate Division, April 18)

New Mexico

A court of appeals has ruled that because the Secretary of State refused to disclose two emails she had received from officials in Colorado pertaining to the possibility that other neighboring states might have registered voters who were not qualified to vote because they were not U.S. citizens until the very end of litigation brought by the ACLU of New Mexico seeking records pertaining to the Secretary's investigation of whether such voters were registered in New Mexico, the trial court did not err in awarding the ACLU of New Mexico about $87,000 in attorney's fees for litigating the case. The Secretary of State argued that the Colorado emails were not responsive to the ACLU's request because they did not relate to possible voter fraud in New Mexico. The appellate court disagreed, noting that the ACLU's request was for records pertaining to allegations of voter fraud by foreign nationals. The court pointed out that "appellant argues on appeal that the Colorado emails are not responsive because they do not contain allegations of voter fraud in New Mexico. This argument is misplaced given the construction of the request. Appellee's [access] request was crafted 'with reasonable particularity' to make the Colorado emails responsive to the request." The appeals court added that "given both the responsiveness of the Colorado emails and the confusion created by Defendants' conduct throughout the litigation, we cannot say that the district court's ruling as to the reasonableness of the fees generated by Appellee during the litigation constituted an abuse of discretion. Because Appellee's actions were reasonable, the [trial] court's award of attorney's fees for the period of time [the trial court ordered disclosure] and the conclusion of the litigation is consistent with the enforcement provision of Inspection of Public Records Act." (*American Civil Liberties Union of New Mexico v. Diana J. Duran*, No. 33,781, New Mexico Court of Appeals, April 20)

Rhode Island

The supreme court has adopted the reasoning of the U.S Supreme Court in *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004), in which the Court found that mere speculation of government wrongdoing did not outweigh the privacy interest of individuals included in law enforcement files, ruling that a state police report of an incident in which former Gov. Lincoln Chafee's son Caleb pled no contest to charges of allowing a minor to have alcohol is exempt because its disclosure would violate Caleb's privacy. As the result of a Memorial Day party at a property owned by the Chaffee family, an underage girl wound up in the hospital shortly after leaving the party. Caleb pled no contest and his record was subsequently expunged. The *Providence Journal* requested the state police report. The state police denied access, claiming disclosure would violate Caleb Chaffee's privacy. The trial court agreed. At the supreme court, that court agreed as well. Noting that the Access to Public Records Act was largely modeled after the federal FOIA, the court explained that *Favish* was on point in this case as well. The court noted that "when the release of sensitive personal information is at stake and the alleged public interest is rooted in government wrongdoing, we do not deal in potentialities—rather, the seeker of information must provide some evidence that government negligence or impropriety is afoot. Because the Journal failed to provide any such evidence, the public interest can, at best, be characterized merely as an uncorroborated *possibility* of government negligence or impropriety. Such a tenuous 'public interest' is insufficient to mandate disclosure under the *Favish* standard that we today adopt and thereby imbue under the APRA." Balancing the *Journal*'s claimed public interest against Caleb Chafee's privacy interest, the court observed that "while the media coverage may have made known to the public the *existence* of the charge, it certainly did not reveal the intimate details

underlying the charge. The privacy interest at stake flows not from the widespread knowledge or the fact that Caleb was charged, but, instead, from the information and personal details that may have been discovered in the police investigation." (*Providence Journal Company v. Rhode Island Department of Public Safety*, No. 2014-182-Appeal, Rhode Island Supreme Court, April 11)

The Federal Courts…

The D.C. Circuit has resolved the remaining issues in the case brought by the ACLU against the CIA and other agencies for records concerning targeted drone strikes, finding the CIA had properly withheld all remaining responsive records under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. The ACLU had scored a significant pyrrhic victory the first time the case arrived at the D.C. Circuit when the court ruled the CIA could not issue a *Glomar* response neither confirming nor denying the existence of records concerning whether the agency had an intelligence interest in targeted drone strikes because the court found that the existence of the program had been publicly acknowledged. But that decision did not resolve whether the agency was required to release any records. Instead, the case was sent back for further proceedings. After conducting a search, the agency concluded that any records were exempt. The district court agreed and the ACLU appealed once again. This time, in an unsigned judgment, the D.C. Circuit concluded that there was no point dragging on the proceedings any further. Agreeing with the district court's finding, the D.C. Circuit panel noted that "the agency's explanations as to why the records are classified are both 'logical' and 'plausible,' and uncontroverted by evidence in the record. The ACLU never argues in its brief that the agency exhibited bad faith. But to the extent it intended to suggest bad faith by pointing out that this court previously overruled the CIA's initial refusal to confirm or deny the existence of responsive records, we are unpersuaded that such attempt exhibited bad faith, and, given the considerable detail presented in the CIA's classified affidavit, we believe that attempt presents an insufficient reason to doubt the veracity of the agency's current assertions about the contents of the records and their classified status." The ACLU argued that the government's announced intention to disclose more information suggested that the case should be remanded for further processing. Rejecting that claim, the court observed that "if the information that the government ultimately releases undercuts the government's exemption claims, the ACLU can file a new FOIA request." (*American Civil Liberties Union v. United States Department of Justice, et al.*, No. 15-5217, U.S. Court of Appeals for the District of Columbia Circuit, April 21)

Judge Ellen Segal Huvelle has ruled that the State Department conducted an **adequate search** for records concerning Hameedullah Amini Airaj's Special Immigrant Visa and properly withheld portions of the records under **Exemption 3 (other statutes)**. Airaj served as a special linguist with Mission Essential Personnel in support of U.S. troops in Afghanistan from June 2008 to January 2012. At that time he was terminated after he refused to participate in a mission to Khost Province because of threats to his life. He later applied for a Chief of Mission approval as an initial step to be allowed to immigrate under the Afghan Allies Protection Act. He requested a Chief of Mission approval three times, which was denied each time because of derogatory information. He then made a FOIA request for records pertaining to his special immigrant visa application. The agency searched a number of components, including the Embassy in Kabul, locating 54 documents, which it indicated might be withheld under Section 222(f) of the Immigration and Nationality Act, which allows the agency to withhold records concerning the issuance of visas. When Airaj appealed, he indicated for the first time that he was particularly interested in the COM denials. The agency searched the Kabul Embassy again and found four documents. It withheld portions of the documents under Exemption 3 as well as **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law**

ACCESS REPORTS

enforcement records). After reviewing the four documents *in camera*, Huvelle found the agency's exemptions claims were appropriate. Airaj contested the time it took for the agency to respond. But Huvelle indicated that "defendant here not only acknowledged the request fairly promptly, but also immediately raised the possibility of 'unusual circumstances' delaying the production of responsive documents. Moreover, defendant actually *did* produce responsive documents well before plaintiff filed his lawsuit." She rejected Airaj's argument that the agency's search was inadequate because it took several searches to locate the records he was seeking. She noted that "when plaintiff directed [State's] attention to his COM adjudication in his administrative appeal in 2015, it conducted a reasonable and appropriate subsequent search of the Kabul Embassy, which led to a supplemental production of responsive records." Because Airaj argued that the derogatory information was not disclosed, Huvelle pointed out that some responsive records had been withheld. She noted that "to argue that the search was inadequate because he did not discover the information that he is seeking is therefore nonsensical." Although some courts have found that Section 222(f) does not always apply to all visa-like records, Huvelle found the provision clearly applied here. She pointed out that "in every meaningful sense, COM approval was conceived, and is administered, as one stepping stone along the path to Special Immigrant Visa issuance." She added that "in the context of the Special Immigrant Visa program created by Congress in the AAPA, it strains credulity to view COM approval as anything but 'pertaining' to the issuance of a Special Immigrant visa." (*Hameedullah Amini Airaj v. United States Department of State*, Civil Action No. 15-983 (ESH), U.S. District Court for the District of Columbia, April 27)

A federal court in New York has ruled that the Department of Health and Human Services properly withheld records pertaining to litigation against the Equal Opportunity Commission of Nassau County under **Exemption 5 (privileges)**. The law firm of Welby, Brady & Greenblatt represented the plaintiff in a class action suit brought against EOC Nassau. When the law firm tried to enforce the judgment against EOC Nassau, attorneys from HHS's Office of General Counsel, officials at the Administration for Children and Families, Department of Justice attorneys representing HHS, counsel for the New York Department of State, and counsel for EOC Nassau exchanged emails concerning the possibility that HHS would intervene in the class action litigation to prevent EOC Nassau from using federal funds to satisfy the judgment. The law firm made a broad FOIA request to HHS for records pertaining to the EOC Nassau litigation and discussions about where the funds might come from to satisfy the judgment. The agency withheld some records under **Exemption 4 (confidential business information)** as well as Exemption 5. The agency's Exemption 5 claims focused on the attorney-client privilege. The law firm argued that the attorney-client privilege did not apply to emails shared with third parties. Rejecting the law firm's reliance on a district court case in which the court found that the attorney-client privilege did not extend to agency policies and statutory interpretations that were being applied to third party requests, the court here noted that "the Court does not accord [the case] such a broad reading as to stand for the proposition that the attorney-client privilege is always inapplicable when a communication discusses facts conveyed by a third party." The court added that "the mere fact that the email chains in those documents contain emails sent to or from third parties does not destroy any claim of attorney-client privilege over later-in-time emails exchanged solely between the Government and its attorneys. The information withheld in these documents is contained within emails exchanged only between the Government and its attorneys—no third parties are recipients or senders of those emails." The agency claimed that communications with EOC Nassau fell within the consultant's corollary because EOC Nassau shared the same goal. Dismissing the claim, the court observed that "here, it cannot be said that EOC Nassau functioned as an arm of HHS in ensuring that funds from federal grants were not used to satisfy the judgment." But the court agreed that the parties had a common interest in the litigation. The court pointed out that the agency's affidavit "establishes that HHS, DOS, and EOC Nassau shared a common legal interest in ensuring that the Judgment is not satisfied with federal grant money administered by HHS and DOS." (*Welby, Brady &*

Greenblatt, LLP v. United States Department of Health and Human Services, Civil Action No. 15-195 (NSR), U.S. District Court for the Southern District of New York, April 27)

Judge Amit Mehta has ruled that the Executive Office for U.S. Attorneys has failed to show that it conducted an **adequate search** for a court order from a federal judge in Nebraska requiring the government to obtain permission from her before filing suit against Bryan Behrens. Without ever determining if the judge had filed such an order, Behrens pled guilty to securities fraud and served a prison sentence. He later made a FOIA request to EOUSA for a copy of the court order showing that the U.S. Attorney for the District of Nebraska had been granted permission by the judge to file suit. The U.S. Attorney's Office for the District of Nebraska conducted a search and found no USAO record, but did find a civil action filed against Behrens by the SEC. EOUSA then concluded that it had no records pertaining to Behrens. Mehta agreed with Behrens that this was not sufficient. He explained that "plaintiff's theory as to the purported existence of an order from [the judge] authorizing his prosecution is straightforward. He contends that [the judge's] orders in [the SEC action] required the U.S. Attorney's Office to obtain a court order before proceeding with a criminal case against him. Because the U.S. Attorney's Office prosecuted him, Plaintiff presumes that there must exist an order from [the judge] authorizing his prosecution." He then noted that "maybe such an order exists; maybe it doesn't. But Defendant did not search all likely locations for such a record. Most notably, it did not search the criminal case file involving the charges for which Plaintiff was convicted. Defendant's assumption that an order from [the judge] might be located in the *civil* case file of the SEC—which it does not possess—is misguided. If the order Plaintiff seeks actually exists, it is reasonable to believe that it could be found among the *criminal* records maintained by USAO-Nebraska pertaining to the case against him. After all, if there is an order authorizing prosecution, it stands to reason that a copy of it would exist within the prosecution's case file. By failing to search that case file, which it admittedly possesses, Defendant failed to carry out its obligation to search those records, 'that are likely to turn up the information requested.'" (*Bryan C. Behrens v. United States Attorney, District of Nebraska*, Civil Action No. 14-0838 (APM), U.S. District Court for the District of Columbia, April 22)

Judge Colleen Kollar-Kotelly has ruled that the Department of Education properly withheld most of its records concerning its investigation of Penn State University for compliance with the Clery Act, which requires colleges receiving federal financial aid programs to track and disclose certain campus crime statistics, under **Exemption 7(A) (interference with ongoing investigation or proceeding)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(E) (investigative methods and techniques)**. She also agreed with the agency that the Higher Education Act of 1965 qualified as an **Exemption 3 (other statute)** statute. In response to Ryan Bagwell's request, the agency located 54,000 potentially responsive records, withholding most of them under Exemption 7(A). The agency explained that when conducting a Clery Act investigation, it first gathered information from the institution under review, drafted a program review report which was shared with the institution, provided the institution an opportunity to review and respond to the report, and then, after considering the institution's response, the agency would issue a final program review report. Because the Education Department had not yet issued a final report, it considered the investigation was still pending and that Exemption 7(A) applied to nearly all the records. Bagwell argued that once Penn State was given the draft report the investigation phase had ended. Kollar-Kotelly rejected the claim, noting that "the Court's conclusion that the investigation remains pending wholly accords with common sense. The agency issued its preliminary report; the institution has had an opportunity to respond; and the agency has yet to issue its final determination. Notwithstanding Plaintiff's argument, the only reasonable conclusion is that the investigation is still pending." Kollar-Kotelly found Penn State's response to the report was also protected by the Higher Education Act of 1965, which required confidentiality for preliminary reports. Accepting that the Higher Education Act was an Exemption 3 statute, she observed

ACCESS REPORTS

that "in order for the confidentiality review provision to have any meaning, it must be read to bar the disclosure of the *content* of any program review report, not simply the report in its bound format—or the electronic equivalent—as delivered to the institution." The Inspector General had also claimed Exemption 7(A) for records concerning a totally unrelated investigation. Kollar-Kotelly agreed with the agency that the IG's investigation was pending. The IG had also withheld the search terms used in the course of the investigation under Exemption 7(E). Kollar-Kotelly noted that "disclosing those terms would, therefore, facilitate the avoidance of the detection of wrongdoing by persons committing such wrongdoing, who could eliminate the terms found in any agency disclosure from their correspondence." (*Ryan Bagwell v. U.S. Department of Education*, Civil Action No. 15-334 (CKK), U.S. District Court for the District of Columbia, April 26)

Judge Randolph Moss has ruled that Edward Harvey, a federal prisoner, is not entitled to recover his **costs** for his suit against the Bureau of Prisons because the agency showed that it had been processing his request before he filed suit after 67 business days had gone by without a response. The agency disclosed the records Harvey requested seven days after he filed suit. He indicated he was satisfied by the response, but contended that he deserved to recover his costs because of the agency's delay. Based on the agency's affidavit, Moss agreed the agency had been processing the request before Harvey filed suit and his suit had no effect on the release of the records. Moss noted that "the BOP argues, in other words, that its release of responsive records was not *caused* by Harvey's lawsuit; on its account, the release would have occurred even without the lawsuit. And the record largely bears out that account. As [the agency affidavit] makes clear, the bulk of the work to process Harvey's FOIA request had already been completed by the time Harvey filed suit. Harvey's lawsuit, at most, prompted the BOP analyst who was handling that request to wrap up work that had already been taken almost to completion." Harvey seemed to argue that an award of costs should be routine when an agency missed the statutory deadline. Moss noted that would be unduly harsh and expensive, but observed that "this is not to say that an agency's pre-suit delay is irrelevant to the analysis. To the contrary, an unusually long delay might give rise to the inference that the agency forgot about, or sought to ignore, a FOIA requester's request—and in such a case an award of costs and fees would be appropriate. But this is not such a case." (*Edward Harvey v. Loretta E. Lynch*, Civil Action No. 14-784 (RDM), April 18)

After the case was remanded by the D.C. Circuit to require the State Department to search former Secretary of State Hillary Clinton's emails for potential responsive records, Judge James Boasberg has once again ruled that the agency conducted an **adequate search** concerning Freedom Watch's request for records pertaining to waivers given companies and countries trading with Iran under the Comprehensive Iran Sanctions, Accountability and Divestment Act or Executive Order 13553. Although the agency had found no responsive records, the D.C. Circuit required State to search Clinton's emails. That search turned up no new records and Freedom Watch asserted the same arguments Boasberg had rejected the first time around. Boasberg noted that "unlike in many FOIA cases, there can be no dispute about the propriety of *where* State looked for documents. In other words, because the case was remanded with instructions about searching only Secretary Clinton's emails, Freedom Watch cannot complain that Defendant should have examined other records systems for responsive materials. The only live question, therefore, relates to the *manner* in which the emails were searched." Boasberg explained that "plaintiff's central argument does not take issue with the mechanics of the search; Freedom Watch, instead, maintains that State's search must be deficient simply because it uncovered no responsive records." Freedom Watch argued that there were at least a half dozen publicly acknowledged sanctions waivers and that there should be some documents pertaining to them. The agency, however, indicated that all those waivers were made under the National Defense Authorization Act and not the statute or executive order identified by Freedom Watch. Boastberg observed that "having explained the distinction in its prior Opinion, the Court is surprised to see Plaintiff ignoring it in its briefing

here." Irritated that Freedom Watch had made the same arguments he had rejected in this earlier opinion, Boasberg noted that "this sloppy work may explain the response of Judge Anne C. Conway of the Middle District of Florida, from whom the case was received on venue transfer, who expressed her displeasure with 'Plaintiff's "say one thing and do another" approach to this litigation,' which has resulted in 'Plaintiff's representations to the Court carrying little, if any water.' Freedom Watch's quest thus ends here." (*Freedom Watch, Inc. v. United States Department of State*, Civil Action No. 14-1832 (JEB), U.S. District Court for the District of Columbia,
April 15)

A federal court in California has ruled that the Department of the Navy has not shown that it conducted an **adequate search** for records concerning a sexual harassment complaint nor has it shown that **Exemption 5 (privileges)** or **Exemption 6 (invasion of privacy)** apply to the records. Dennis Buckovetz requested a copy of the sexual harassment complaint and related records from the Marines Corps. The agency initially withheld records under Exemption 5, but subsequently withheld the complaint and made other redactions of personal information under Exemption 6. Buckovetz argued that letters of reprimand were issued as a result of the complaint but had not been disclosed. Since the agency did not respond to Buckovetz's challenges on the search, the court found it had not yet shown the search was adequate. Examining redactions made to email strings under Exemption 6, the court noted that "Defendant provides no information as to why disclosing names associated with this email string would qualify as a 'clearly unwarranted invasion of personal privacy.' Similarly, three more email strings were released with names and statements redacted that might identify the individuals involved in the conversation. Defendant provides no factual basis or authority for redacting names of individuals discussing 'the process with which complaints will be investigated.'" As to the Exemption 5 claim, the court pointed out that the agency staffer who conducted the search said "she requested any responsive records, was informed they were all communications with an attorney and that the attorney asserted privilege under section 552(b)(5). The court 'is not allowed to grant summary judgment based on such conclusory statements.'" (*Dennis M. Buckovetz v. U.S. Department of the Navy*, Civil Action No. 15-939-BEN (MDD), U.S. District Court for the Southern District of California, April 14)

Judge Beryl Howell has ruled that the Bureau of Prisons and the Executive Office for U.S. Attorneys properly responded to prisoner Barry Schotz's multiple FOIA requests for information about various medical procedures, other aspects of his incarceration, and his criminal case. While Schotz complained about the responses he received, Howell found that both agencies had conducted **adequate searches** for responsive records. She chided BOP for disclosing information piecemeal in response to one request, but noted that "while the defendant's presentation is neither condoned nor encouraged, the plaintiff does not dispute that he received the supplemental release of requested records. . .And, 'however fitful or delayed the release of information under the FOIA may be, once all requested records are surrendered, federal courts have no further statutory function to perform.'" (*Barry R. Schotz v. United States Department of Justice*, Civil Action No. 14-1212 (BAH), U.S. District Court for the District of Columbia, April 20)

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